THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

PETER B., individually and as guardian of M.B., a minor

Plaintiff,

vs.

PREMERA BLUE CROSS, MICROSOFT CORPORATION, and MICROSOFT CORPORATION WELFARE PLAN,

Defendants.

Case No. 2:16-cv-01904-JCC

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

ORAL ARGUMENT REQUESTED

Plaintiff Peter B. ("Peter"), individually and as guardian of M.B., a minor, through his undersigned counsel and pursuant to F.R.C.P. 56, files the following Reply in Support of his Motion for Summary Judgment filed on September 20, 2017.

ARGUMENT

I. PBC CANNOT SHOW THAT IT HAS DISCRETIONARY POWER AND THE APPROPRIATE STANDARD OF REVIEW IS *DE NOVO*

There is no disagreement between Peter and PBC that under any ERISA plan the standard of review is *de novo* unless the plan-governing document grants discretionary authority to a plan administrator to interpret the terms of the plan and determine eligibility for benefits under the plan. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). Peter B., however,

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disagrees with PBC that "the Plan contains a clear, unambiguous grant of discretionary authority to interpret the Plan's terms and determine benefits eligibility through the Administrative Services Contract between [PBC] and Microsoft." Defendants' Opposition to Plaintiff's Motion for Summary Judgment ("PBC Opp Memo"), docket #43, pp. 2-3. PBC cites Sections 1.02 and 1.03 of the Administrative Service Contract to support its argument that "discretion was successfully conferred to [PBC]." *Id.* But Administrative Service Contract cannot effectively grant any discretionary authority to PBC.

The application of a proper standard of review is a matter determining whether the plan "unambiguously" provide discretion to the administrator. *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 963 (9th Cir. 2006) (citing *Kearney v. Standard Ins. Co.*, 175 F.3d 1084, 1090 (9th Cir. 1999)). The analysis must start with an inquiry of whether there is a master plan document in the record before the Court because "the record that was before the administrator furnishes the primary basis for review." *Kearney* at 1090. Here, there is no master plan document in the record for the Court to determine whether PBC has discretionary authority. Peter B.'s Opening Memo, docket #42, pp. 12-13. ERISA requires that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument. 29 U.S.C. 1102(a)(1). The record before this Court only contains copies of the 2015 and 2016 SPDs, which are summaries of the governing plan documents, not the documents themselves. *CIGNA Corp v. Amara*, 563 U.S. 421, 436-438 (2011). Also, there is nothing in the record indicating the SPDs are part of the master Plan either. Because the SPDs are not made a part of the master plan documents, under both *Amara* and *Prichard v. Metropolitan Life Ins. Co.*, 783 F.3d 1166, 1169 (9th Cir. 2015), the SPDs cannot be considered part of the documents governing the contractual relationship between the parties.

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More importantly, the Administrative Service Contract on which PBC relies for its grant of discretionary authority is clearly not a governing document for purposes of the relationship between Microsoft, the Plan sponsor, and Peter B., the employee, because there is no reason to believe that the Administrative Services Contract was ever disclosed to Peter B. Assuming that document is one that relates to the operation of the Plan, it does not provide any basis to grant discretionary authority in this case. The terms of an administrative service contract between an ERISA plan sponsor and a third party administrator are not enforceable against the plan participants and beneficiaries when those individuals do not have notice of the terms of the administrative service contract. *Stephanie C. v. Blue Cross Blue Shield of Mass. HMO Blue, Inc.*, 813 F.3d 420, 429 (1st Cir. 2016) (holding that the terms of an undisclosed administrative services contact for a self-funded plan are not sufficient to establish discretionary authority and trigger an abuse of discretion standard of review). There is no evidence that PBC ever provided or disseminated the terms of Administrative Service Contract to the Plan participants.

ERISA makes very clear that plan sponsors must give notice to the participants and beneficiaries of the plan of their rights and obligations under the ERISA benefit plan. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995). Because there is no governing Plan document before this Court and the terms of Administrative Service Contract are not enforceable to establish discretionary authority in connection with a claimant's action to enforce the terms of the Plan, PBC has failed to carry its burden of proof and move the standard of review away from the default under *Bruch*. Consequently, this Court should apply a *de novo* standard.

PBC cites *Daniel v. UnumProvident Corp.*, 261 Fed. Appx. 316, 318 (2nd Cir. 2008), for the proposition that the Administrative Service Contract should be considered because it is necessary "to establish which entity actually decided her claim and therefore which standard of

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review was applicable in federal court." PBC Opp Memo, p. 3. But in *Daniel* the claimant did not assert that the failure to disclose the terms of an administrative services contract barred the court from considering its terms. The decision in *Daniel* did not reach the question before this Court: whether a discretionary authority clause in an administrative services contract not routinely distributed to plan participants and beneficiaries is sufficient to trigger an abuse of discretion standard of review. Even if this Court takes into consideration the terms of the Administrative Service Contract, the question is whether that undisclosed document confers any discretionary authority on PBC for purposes of binding a claimant to an abuse of discretion standard of review in a recovery of benefits claim under 29 U.S.C. § 1132(a)(1)(B). ERISA's notice and disclosure requirements, outlined in *Schoonejongen* and *Stephanie C.*, make clear that the Administrative Services Contract doesn't have that effect. And *Daniel* does not address that question. It is of no assistance to PBC.

II. M.B'S MEDICAL RECORDS CONTAIN EVIDENCE DEMONSTRATING HIS TREATMENT WAS MEDICALLY NECESSARY

A. Peter B. Provided Ample Evidence Showing M.B.'s Declining Mental Health Condition Necessitated Residential Treatment and the Degree the Treatment Helped M.B.'s Symptoms.

PBC makes a broad statement in its Opposition that Peter B. "failed to provide any support that the treatment received by M.B. was medically necessary." PBC Opp Memo, p. 5. PBC also argues that Peter B. "offers no evidence or authority to support [the] assertion" that discontinuing coverage violated the terms of the Plan. *Id*. Apparently PBC wants this Court to completely disregard the medical information provided by Peter B. in his extensive appeal letters and the references to them in Peter B.'s Opening and Opposition Memoranda. Be that as it may, this statement by PBC cannot be reconciled with M.B.'s medical record and treatment history, let

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alone with arguments Peter B. presented, that show how ill his M.B. was and that residential treatment was the appropriate level of care to treat his condition. M.B's symptoms were not pronounced to the degree that he required hospitalization at an acute, inpatient level of care. At the same time, his condition was declining to the point that his Obsessive Compulsive Disorder ("OCD") and Autism Spectrum Disorder ("ASD") symptoms made life for his parents and siblings almost unbearable.

PBC argues that it had independent psychiatrists who are free from conflict of interest support its denial. But this is not accurate. The psychiatrists employed or retained by PBC are not free from taint simply because they say they are. Those individuals, whether employees or contractors, know who hires and pays them. A more conflict free opinion comes from Dr. Steve DeBois, Ph.D., M.B.'s treating psychologist at Second Nature. He personal knowledge of M.B.'s treatment needs in the immediate time frame before M.B.'s admission to Daniels Academy. He was not giving an opinion that related to either his own or Second Nature's existing or future treatment relationship with M.B.

Dr. DeBois' opinion, provided to PBC by Peter B. in his first appeal letter dated September 3, 2015, makes clear that he has both personal knowledge of M.B.'s condition and symptoms and that this personal knowledge was gained at the most relevant time in prescribing medically necessary treatment: immediately before his admission to Daniels Academy. See PRE_BER000068. Dr. DeBois states that he is "extremely concerned" about M.B. relapsing if he returned directly to home after completing the wilderness program at Second Nature. *Id*. Dr. DeBois unequivocally recommends residential treatment so that M.B. can "practice and internalize the tools he learned at Second Nature." *Id*. He goes on to state that for M.B. to return home, even "even with intensive outpatient therapy or school accommodations, would almost

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certainly result in significant regression and return to his previous level of functioning." *Id.* Dr. DeBois provides the most trustworthy professional evaluation of whether M.B.'s treatment at Daniels Academy was medically necessary.

PBC also revisits yet another one of its shifting rationale for why the claim was denied (this one raised for the first time in litigation), that M.B. is not being provided meaningful mental health treatment at all but is just attending what it characterizes as "boarding school."[1] However, as pointed out in Peter B.'s Opp Memo, PBC's jump to yet another different reason for why it was justified in denying the claims arising out of M.B.'s treatment simply highlights the degree to which PBC is an adversary bent on denial of the claims. *Friedrich v. Intel Corp.*, 181 F.3d 1105, 1110 (9th Cir. 1999). The reality is that Peter B. has been shooting at a moving target throughout the entire pre-litigation claim and appeal process as well as in litigation. After Peter B. addresses a concern PBC raises, PBC abandons that reason and trots out a new and different argument for denying the claim.

PBC refers to as "cryptic references to web pages and case citations" at p. 5 of its Opp Memo in response to the information Peter B. provides about the nature of residential treatment and the care M.B. received at Daniels Academy. But the decreasing levels of intensity of treatment that accompany stepped down levels of care from acute inpatient to sub-acute residential treatment to intensive outpatient mental health treatment are outlined in PBC's own criteria. And the citations to the Substance Abuse and Mental Health Services Administration

[1]PBC asserts that "the parties agree that Daniels Academy is a 'boarding school for boys,'" PBC Opp. Memo, p. 4, without citing anything for the authority that Peter B. agrees with this characterization. In fact, Daniels Academy is licensed as a residential treatment center under Utah law and PBC accepted that characterization of Daniels Academy in the pre-litigation appeal process.

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(SAMSHA) description of residential treatment corresponds with generally accepted standards of medical practice.

As Peter B. detailed in his pre-litigation appeal correspondence and at his Opp Memo, pp. 12-15, M.B. suffered from co-occurring OCD and ASD disorders which made it harder for his providers to diagnose and treat his condition. PBC ignores that entirely. But M.B.'s treatment team members were well aware of the increased complexity M.B.'s co-morbid conditions presented and Peter B.'s appeal letters made it clear those challenges were one of the reasons his providers recommended continued long-term treatment at Daniels Academy.

In its Opp Memo, PBC contends that M.B. did not meet PBC's continued residential stay criteria, because there was no evidence that M.B. made progress "even after 90 days, much less the thirty days required by the foregoing criteria." *Id*. at 7. PBC contradicts its March 11, 2015, denial letter where PBC stated that residential treatment is medically necessary "only when the plan is stabilize your difficulties in a short term stay, usually approximately 90 days or less, and then transfer to another level of care," pointing also to the lack of discharge planning. PRE_BER 001377. The denial letter reasoning is premised on the assumption that M.B. in fact was stabilized, which logically presupposes some improvement in his condition from the time he was admitted. The only continued stay criteria PBC mentions in its March 11, 2015, denial letter is the lack of an early discharge planning, which PBC never discussed in any of the denial letters or its briefing in this action.

PBC also contradicts its October 2, 2015, denial letter, where PBC denied coverage based on M.B.'s apparent lack of improvement, but where Dr. William Holmes stated that "the patient's functioning is noted to be relatively better while away from home. However, he continues to have problems related to his obsessive – compulsive disorder, along with poor

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social interactions, which are characteristic of autism spectrum disorder." PRE_BER000039. If the requirement for continued treatment is to show signs of improvement and a positive response to the treatment, presence of symptoms should not have been a reason to deny coverage. Considering M.B.'s struggle with his OCD and ASD symptoms, Dr. Holmes' acknowledgement of an improvement in M.B.'s condition is significant. *Id.*

Peter Weiss, a licensed mental health counselor, who treated M.B. for OCD from December 31, 2013 through September 24, 2014, on an outpatient basis described those struggles as "a particularly severe case, which was made more complicated and difficult to treat due to [M.B.'s] persistent denial that he had OCD. Mr. Weiss described M.B.'s compulsions as those that could "quickly become violent and destructive in nature," and "directed toward property and a times his parents." PRE_BER000495 . Mr. Weiss observed that during the course of treatment M.B.'s "physical aggression escalated [] to a degree that [M.B.] needed more support and intensive care than he could receive in an outpatient setting." *Id*.

What Mr. Weiss recognized as "a particularly severe case," referring only to M.B.'s OCD symptoms, was subsequently confirmed and explained by Douglas Maughan, LCMHC, M.B.'s primary therapist at DA, as M.B. suffering from co-occurring disorders, making his condition exceptionally difficult to treat. PRE_BER000492.

PBC argues that Peter B. "only includes passing, fragmentary, and conclusory quote from Mr. Maughan's opinion" referring to his August 11, 2015, letter, in his Opp Memo. PBC Opp Memo, p. 6. In fact, Peter B. provided numerous quotes from Mr. Maughan's August 11, 2015, and January 23, 2016, letters, along with the quotes from Mr. Weiss and Dr. Debois dated August 6, 2015, and January 1, 2015, respectively. PER_BER0000492-493, PER_BER0000692-693, PER_BER0000495, PER_BER0000278-281. The evidence offered is in stark contrast to

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PBC's assertion that "Peter offered two letters from M.B's threating therapists discussing and recommending the need for residential treatment." PBC's Opp Memo, p. 8. As Peter B. argued in his Opp Memo, PBC ignored the second letter from Mr. Maughan, dated January 23, 2016, providing an extensive update on the progress M.B made as a result of the therapy he received at DA, and the opinion of Dr. Debois. PRE_BER000693-692, PRE_BER000278-280. Dr. Debois was M.B.'s treating clinician from Second Nature wilderness program where M.B was treated from September 30, 2014, through January 1, 2015. PRE_BER000278-280. It is therefore incorrect that Peter B. "has not offered, designated, or disclosed any other treating therapists." PBC's Opp Memo, p. 9.

At various times, PBC asserts that the information Peter B. presented in the pre-litigation process was "irrelevant," "lacks foundation," or lacks "reliability." PBC Opp Memo, p. 9. PBC has no legal basis to make these assertions. The pre-litigation appeal process is designed to allow for an expeditious and efficient exchange of information that will allow claims to be resolved without undue expense. *Mack v. Kuckenmeister*, 619 F.3d 1010, 1020 (9th Cir. 2010) (exhaustion of pre-litigation appeal obligations is required to "help reduce the number of frivolous lawsuits under ERISA; to promote the consistent treatment of claims for benefits; to provide a non-adversarial method of claims settlement; and to minimize the costs of claims settlement to all concerned"). The information intended to be provided in that pre-litigation appeal process is not intended to meet the standards or requirements of the Federal Rules of Evidence. More important, "[i]f a court reviews the administrator's decision, whether *de novo* [], or for abuse of discretion, the record that was before the administrator furnishes the primary basis for review. *Kearney* at 1090. Dr. DeBois, Mr. Weiss, and Mr. Maughan's letters are already part of

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the administrative record before the Court. PBC's discussion about their relevancy is, in fact, irrelevant.

The only ERISA case PBC cites to support its argument on this point, *Mason v. Equitable*, 32 Fed. Appx. 289 (9th Cir. 2002) in unpublished. The idea that the evidentiary standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) apply to the pre-litigation appeal process flies in the face of the well established precedent in the Ninth and other Circuits outlining the need and reasons for requiring pre-litigation appeal exhaustion.

Finally, PBC does not explain why letters from M.B.'s treating physicians would be any less reliable and relevant than the opinions of PBC's physicians who did not have the privilege and opportunity to treat and observe M.B. It is especially improper to ignore the findings and conclusions of health care professionals when dealing with the treatment of individuals who have mental health conditions. When the information from a medical record arises out of an examination of a mental health patient, the treating physician is in the best position to evaluate and come to valid conclusions about the symptoms and diagnoses of a patient. *Javery v. Lucent Technologies, Inc. LTD Plan*, 741 F.3d 686, 702 (6th Cir. 2014) (file reviews are of questionable validity when evaluating a patient with mental illness); *Smith v. Bayer Corp. LTD Plan*, 257 Fed Appx. 495, 505-509 (6th Cir. 2008) (courts discount "for obvious reasons" the opinions of medical file reviewers who have not seen the patient); *Sheehan v. Metropolitan Life Ins. Co*., 368 F.Supp.2d 228, 254-255 (S.D.N.Y. 2005) ("courts routinely discount or entirely disregard the opinions of psychiatrists who had not examined the individual in question at all or for only a limited time"); *Westphal v. Eastman Kodak Co*., 2006 U.S. Dist. LEXIS 41494, *12-17 (W.D.N.Y. 2006) ("the opportunity to interview and interact with a psychiatric patient is crucial to the diagnosis" of a mental health disorder).

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PBC tries to discredit Mr. Weiss' professional opinion expressed in his August 6, 2015, letter because Mr. Weiss' letter was dated nearly a year after he last treated M.B. PBC's Opp Memo, pp. 8-9. Mr. Weiss treated M.B. on an outpatient basis while M.B. was at Daniels Academy and his opinion was primarily based on his observations and professional judgement from that time. PER_BER000495. The only reference in Mr. Weiss' letter to the time outside M.B's outpatient treatment is when he said: "It is my hope that [M.B.], with a therapeutic/residential level of support, will be able to regain important aspects of his life and return home and mainstream school program." *Id*. If anything, the distance in time arguably gave Mr. Weiss greater objectivity and independence of judgment than if his letter had been written at the same time he was treating M.B.

PBC also tries to downplay Mr. Maughan's opinion as reporting M.B.'s "modest progress" by expressing that "[M.B.] has recently started to take accountability and responsibility for his choices." PBC Opp Memo, p. 8. PBC tries to equate M.B.'s taking "accountability and responsibility for his choices rather than assigning blame to external things or people" with "increased participation in treatment…attendance …compliance with treatment recommendations, increased compliance with facility/program rules..," factors that, according to PBC's guidelines, are not considered a clinical progress. *Id*. PBC ignores equally valid and more likely possibility that M.B.'s increased accountability and responsibility are result of the treatment M.B. received at Daniels Academy.

In response to PBC's argument that "[a]s an employee of Daniels Academy, Mr. Maughan has an interest in this appeal, PBC Opp Memo, p. 9, Peter B. argued in his Opp Memo, p. 18, that PBC does not distinguish Mr. Maughan's alleged conflict of interest from the conflict of interest of Dr. Robert Small, an employee of PBC signing the March 11, 2015, as well as PBC

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hiring MRIoA and AMR to perform an external review on PBC's behalf. PRE_BER001378, 000037, 000934. In fact, the inquiry into a possible conflict of interest in ERISA claims generally concern actions of a plan administrator. Even under an abuse of discretion standard "[a] court may weigh a conflict more heavily if, for example, the administrator provides inconsistent reasons for denial." *Abatie* at 968.

Finally, the point PBC tries to make with its counter analysis of *Harlick v. Blue Shield of California*, 686 F.3d 699 (9th Cir. 2012) at pp. of its Opp Memo is unclear. In his Opening Memo, p. 15, Peter B. relies on *Harlick* for the proposition "that 'residential care' has a fairly well-established meaning in the context of the treatment of mental illness," as a non-hospital, inpatient care. PBC on the other hand, argues that "the residential treatment center at issue in *Harlick*, provided the claimant urgently needed medical care in response to her doctors' recommendations," and that this was "[i]n contrast to the boarding school experience provided to M.B. while he was in a relatively stable, sub-acute condition by Daniels Academy- which had not been referred to M.B. by his doctors." PBC Opp Memo, p. 10. But the point of *Harlick* is that, regardless of the specific nature of the patient's condition and needs in that case, the case supports the proposition that residential treatment is a sub-acute inpatient level of care for mental health conditions.

Contrary to PBC's claim that Daniels Academy is merely a boarding school, that facility is registered as a licensed residential treatment center where charges are as for medical services, not boarding school tuition. https://hslic.utah.gov/db-search/?id=14845 (last checked 10/14/2017). PBC's argument rests on two premises that are flawed: because M.B. did not require urgent care and his doctors did not recommend residential treatment his treatment at Daniels Academy was not medically necessary. This is a novel rationale for the denial and is

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hard to reconcile with the Plan differentiating between acute and residential levels of mental health care providing corresponding admission and continued stay criteria for each of levels. PRE_BER000743-744, PRE_BER000744-746, PRE_BER000140-144. It is also in contrast to M.B.s medical record where all three of his therapists, Mr. Peter Weiss, Dr. Steve Debois from Second Nature and Mr. Douglas Maughan from Daniels Academy, recommended residential treatment for M.B. PRE_BER001278, PRE_BER000278-281, PRE_BER000492.

B. PBC's Conflicting Rationales for the Denial of Benefits Based on Different Criteria Cannot Constitute an Agreement that M.B.'s Treatment was not Medically Necessary.

PBC's contention that "the Court should give no weight to the opinions of the only two expert opinions in the record supporting Plaintiff's case," PBC Opp Memo, p. 11, misstates M.B.'s treatment history and the Record before this Court. PBC never explains why this Court should ignore treatment records compiled in the course of his care at Daniels Academy. First, considering only the opinions of Mr. Weiss and Mr. Maughan ignores the opinion of the individual whose opinion about the medical necessity of M.B.'s treatment at Daniels Academy was, perhaps, most probative: Dr. DeBois. Beyond that, the argument that the opinions of Mr. Weiss and Mr. Maughan "are contradicted by the opinions in the record of two independent psychiatrists" could only be seriously entertained if PBC's "independent psychiatrists" indeed agreed based on the same rationale and criteria. But their opinions differ in their rationale and apply different criteria for medical necessity for M.B.'s treatment.

As Peter B. pointed out, *supra* pp. 9-10, in ERISA claims, regardless of the standard of review, the court reviews the record that was before the plan administrator. ERISA claims are generally brought because there is a disagreement on the availability of benefits based differing opinions whether there was a medical necessity for the treatment in question. The line of PBC's

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reasoning that "[s]ummary judgment is improper where there is a conflict between expert opinions," suggests that summary judgments in ERISA cases would be precluded because there is always "a conflict between expert opinions." PBC Opp Memo, p. 11. To support this novel proposition as it applies to ERISA benefit recovery actions, PBC cites two patent cases *Hodosh v. Block Drug Co*., 786 F.2d 1136, 1143 (Fed. Cir. 1986) and *Hilgraeve Corp. v. McAffee Assocs*., 224 F.3d 1349, 1353 (Fed. Cir. 2000). Neither case discusses ERISA claims.

In fact, a number of Circuits hold that when dealing with ERISA benefit denial cases, "summary judgment is merely a vehicle for deciding the case; the factual determination of eligibility for benefits is decided solely on the administrative record, and 'the non-moving party is not entitled to the usual inferences in its favor.'" *Gilliam v. Nev. Power Co*., 488 F.3d 1189, 1192, n.3 (9th Cir. 2007) (quoting *Bard v. Boston Shipping Association*, 471 F.3d 229, 235 (1st Cir. 2006)); *LaAsmar v. Phelps Dodge Corp. Life AD&D, and Dependent Life Ins. Plan*, 605 F.3d 789, 796 (10th Cir. 2010) (same).

Tedesco v. I.B.E.W. Local 1249 Ins. Fund, 2017 U.S. Dist. LEXIS 133080 (S.D.N.Y. August 21, 2017) is another case PBC cites to support its argument that summary judgment is improper when faced with competing expert opinions in ERISA benefit cases. *Tedesco* specifically provided that "it is inappropriate for a court to grant summary judgment where the resolution of an ERISA benefits dispute entails adopting one medical expert's opinion over another." *Id* *32. *Tedesco* concludes "'[w]hen using *de novo* review, the Court 'stands in the shoes of the original decisionmaker, interprets the terms of the benefits plan, determines the proper diagnostic criteria, reviews the medical evidence, and reaches its own conclusion about whether the plaintiff has shown, by a preponderance of the evidence, that she is entitled to benefits under the plan.'" *Id*. *15 (citing *Tretola v. First Unum Life Ins. Co.*, Case No. 13-cv-

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231, 2015 U.S. Dist. LEXIS 14666, 2015 WL 509288, at *22 (S.D.N.Y. Feb. 6, 2015)). The decision in this case turns on whether PBC's decision to deny coverage for M.B.'s continued residential treatment based on the Plan's criteria and the conflicting rationales PBC provided in each of its denials of benefits was improper. To that point, it is not necessary to weigh conflicting expert opinion.

In its Opp Memo, PBC repeats the facts describing the appeal process in which it denied coverage for M.B.'s continued residential treatment, without providing a substantive analysis and response to Peter B.'s argument that PBC's denial was based on shifting rationales. *Id*. at 11-13. Especially troublesome is the lack of response to Peter B.'s argument that a new denial rationale was provided in the final denial letter by Advanced Medical Reviews ("AMR"), an external review organization, based on the Residential Acute Level of Care admission criteria. PER_BER000935-939. Peter B. argued in his Opening Memo that those were the wrong criteria to apply because M.B. was already admitted to Daniels Academy, and the denial of M.B.'s coverage because "M.B. did not have psychosis, hallucinations, delusions and mania" demonstrated that the reviewer either did not understand the difference between acute and sub-acute levels of care or made a mistake in applying the wrong criteria. *Id.* at 18. PBC responds by addressing, as discussed below, whether AMR's action constituted a procedural violation. But PBC never satisfactorily responds to Peter B.'s substantive argument that AMR utilized the wrong criteria in evaluating M.B.'s claim.

C. PBC's Violations of ERISA Claim Procedures Call for Reversal of the Denial of Coverage.

PBC fails to respond in a meaningful way to Peter B.'s argument that PBC engaged in ERISA claim procedures violations when it did not address Peter B.'s arguments and information

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he included in his appeals. Peter B.'s Opening Memo, pp. 19-21. PBC claims that "this assertion is unsupported by the evidence," completely failing to address the fact that PBC was required by ERISA to engage is a meaningful dialogue during the appeal process, respond to Peter B.'s questions, and take into account the information he presented. *Booton v. Lockheed Medical Benefit Plan*, 110 F.3d 1461, 1463 (9th Cir. 1997). Instead, PBC insists that it relied on its policy and criteria and that "[t]o the extent that the rationale used by [AMR] diverged from that of [PBC's] internal reviews- which it did not in any significant way – that is irrelevant to whether [PBC] administered the ERISA claim consistently, because [AMR] was approved by the state of Washington, and was unaffiliated with [PBC]." PBC's Opposition, pp. 14-15. That assertion revels that PBC conflates the issue of ERISA claim procedures violation with the problem of shifting rationales, which are two different arguments. Besides the fact that PBC did not adequately respond to the former, there is also a problem with PBC addressing the latter argument.

While distancing itself from AMR's rationale, PBC defines AMR's decision as "an opinion which was rendered by an entity wholly independent of [PBC]" and that "[AMR's] decision is not [PBC's]. PBC Opp. Memo, p. 14. The question that remains is how PBC is going to reconcile that assertion with its previous argument that two independent psychiatrists agreed that M.B.'s treatment was not medically necessary. Considering all the inconsistences in PBC's arguments, PBC cannot claim that "all three rationales are consistent." *Id*. at 15. Simply asserting that they are is not sufficient.

It is also inappropriate for PBC to engage in a discussion and analysis of a criterion that was never mentioned in the appeal process, speculating that M.B. did not make any progress after 30 days of treatment, and therefore should be grateful for the length of treatment PBC

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covered. PBC Opp Memo, pp. 15-16. PBC's evidence that M.B. did not improve after first 30 days consists in citing the denial rationale expressed in PBC's second denial on October 2, 2015, subsequent to PBC first denial on March 11, 2015, after covering 90 days of treatment.

Finally, despite trying to distance itself from AMR's decision, which was based on an application of improper criteria for acute, inpatient treatment, PBC argues "[AMR'] criteria referencing terms such as 'imminent danger to self,' or 'imminent danger to others,' are indeed a part of the relevant residential treatment continued stay criterion." PBC Opp Memo, p. 16. While it is correct that the Plan's Additional Criteria for Psychiatric Residential Treatment Admission contain a requirement of "continued repetitive harm to self or others or active harm to self or others," for the admission to residential treatment, there is no requirement that there be "imminent danger," to self or others. PRE_BER000744. The presence of danger of harm to self or other is not the same as presence of imminent danger to self or others. The requirement of imminent risk to self or others is in fact part of the Plan's acute criteria for inpatient admission.

CONCLUSION

The standard of review in this case is *de novo*. The Record reflects that treatment at Daniels Academy was medically necessary and satisfied the Plan criteria for coverage. The individuals in the best position to evaluate M.B.'s care were those individuals who had and were treating him immediately before and at Daniels Academy. PBC's constantly shifting reasons for denial of the claim demonstrate that it was acting in an adversarial manner. The reasons PBC and its reviewers gave for denying M.B.'s claim are inconsistent both with the Plan's medical necessity criteria and with each other. It is appropriate for this Court to reverse PBC's denial of coverage for his son's residential treatment, order payment of the claims and Daniels Academy,

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and order payment of prejudgment interest and Peter B.'s attorney fees and costs under 29 U.S.C. § 1132(g).

Dated this 16th day of October, 2017.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 16th day of October 2017, the foregoing document was presented to the Clerk of the Court for filing and unloading to the CM/ECF system. In accordance with the ECF registration agreement and the Court's rules, the Clerk of the Court will send email notification of such filing to the following:

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